SUPREME COURT, U.S.
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No. 99-

IN THE

Supreme Court of the United States

GIAO NGUYEN,

Petitioner,

v.

INOVA ALEXANDRIA HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When there is no dispute about the date on which complainant actually received her "right to sue" letter from the EEOC, does the 90-day period in which she may file suit under Title VII commence: a) on the date of receipt, as the EEOC and many circuits hold, or b) as the Fourth Circuit held in this case, three days following the issuance date of the EEOC letter.

2. Whether a neighbor, collecting mail for a charging party during a one-week vacation, qualifies as an agent of the charging party for purposes of commencement of the 90-day right to sue period, or whether the imputation of receipt should be limited to counsel and those living in the same household.

3. Whether equitable tolling principles should apply when improper EEOC advice contributes to a belated filing of a Title VII suit, and where the complainant has taken all reasonable steps to ensure the suit is filed in a timely manner.

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Petitioner Giao Nguyen respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion, *Giao Nguyen v. Inova Alexandria Hospital*, 187 F.3d 630, 1999 WL 556446 (4th Cir. 1999) (Table, Text in Westlaw) (B). The opinion of the district court for the Eastern District of Virginia captioned *Giao Nguyen v. Inova Alexandria Hospital*, Civ. No. 97-1935-A is an unpublished memorandum opinion (App. B) as is the district court's order denying Ms. Nguyen's Motion to Alter or Amend the court's Order (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on July 30, 1999. The Court of Appeals denied a timely petition for rehearing or rehearing en banc on August 24, 1999 (App. B).

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1), provides that "the Commission . . . shall . . . notify [the complainant of the dismissal] and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge."

Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. Part 1601.28(e)(1), provide in relevant part that notice of right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days from receipt of such authorization."

Federal Rule of Civil Procedure 6(e) provides:

> (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

STATEMENT OF THE CASE

A. Legal Context

Congress established an administrative process by which aggrieved individuals initiate claims for relief under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e et seq., from unlawful discrimination. The Act requires that a charge of discrimination first be brought to the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. Id. at §2000e-(5)(e). If the Commission dismisses the charge or issues a right to sue letter, the complainant may bring a civil action in court within 90 days "of the giving of such notice" of dismissal or of right to sue. Id. at §2000e-5(f)(1).

B. Facts

The facts as provided by the Court of Appeals are adequate for purposes of this appeal. (App. A). Ms. Nguyen worked as a registered nurse at INOVA Alexandria Hospital, primarily in the intensive care unit, from 1981 until her termination on June 18, 1996. Ms. Nguyen raised an internal complaint of discrimination which was amended to include retaliation upon her termination. Ms. Nguyen timely lodged her complaint with the Alexandria Human Rights Commission, which referred it for processing to the Equal Employment Opportunity Commission ("EEOC").

Upon dismissal of Ms. Nguyen's EEOC charge, the EEOC mailed Ms. Nguyen a Notice of Dismissal and a letter notifying her of the right to sue. The letter notifying her of the right to sue was dated August 20, 1997, and the letter, along with the Notice of Dismissal, were mailed together by regular (not certified) U.S. mail to Ms. Nguyen's correct home address of record.

On August 22, 1997, Ms. Nguyen and her family left for a family vacation at the seashore before school resumed, and returned on September 1, 1997. The Nguyens asked their next door neighbors, Kurt and Kathy Thompson, to collect their mail from their mailbox during their vacation. The neighbors did so as they had in the past.

On September 1, 1997, Labor Day, upon returning from the shore, Ms. Nguyen's husband retrieved the pile of mail from their neighbors. On September 2, 1997, Ms. Nguyen opened the mail, finding the EEOC letter providing the right to sue and the Notice of Dismissal.

The EEOC right to sue letter opened by Ms. Nguyen on September 2, 1997, states:

> The Director has decided to dismiss your charge and issue you a notice of right to sue. The enclosed document entitled "Dismissal and Notice of Rights" explains that, should you wish to pursue the matter in court, suit must be filed within 90 days ***of your receipt of this letter***.

(emphasis added). The attached Dismissal and Notice of Rights stated:

> Notice of Suit Rights
>
> Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. **If you decide to sue, you must sue <u>WITHIN 90 DAYS</u> from your receipt of this Notice.** Otherwise, your right to sue based on the above-numbered charge will be lost.

(emphasis in original).

On September 9, 1997, Ms. Nguyen telephoned counsel to make an appointment for a legal consultation. An appointment was made for September 19 and Ms. Nguyen was required to bring a copy of her EEOC file. Also on September 9, 1997, Ms. Nguyen made a request to the EEOC for a copy of

her file, which request she confirmed in writing. Ms. Nguyen made several follow-up calls and personal visits to the EEOC in an attempt to obtain her file to no avail. Counsel rescheduled the legal consultation to September 26 due to the non-receipt of the file. After additional calls and visits, the EEOC finally copied the file for Ms. Nguyen when she demanded it on the morning of September 26 in order for her to keep her appointment with counsel.

Upon reviewing the file on September 26, counsel asked Ms. Nguyen to provide additional information. During the next month, Ms. Nguyen met with a doctor with whom she had worked and obtained from him a written statement supporting her version of key events related to her harassment and discharge claim. Ms. Nguyen also telephoned the EEOC and asked when her 90-day right to sue period began. An EEOC case worker and a supervisor both told Ms. Nguyen that her right to sue period began the date she received the notice, but that she would have to prove when she received it. On November 7, 1997, counsel met with Ms. Nguyen and reviewed the new evidence and, for the first time, a representation agreement was entered into for the sole purpose of attempting settlement.

On November 20, 1997, counsel sent by hand-delivery a settlement demand letter to counsel for the hospital; the letter indicated December 1, 1999, was the deadline to file suit. On November 26, 1997, defense counsel substantively responded and rejected settlement overtures. Ms. Nguyen filed suit *pro se* on November 28, 1997, and defense counsel thereafter successfully claimed that the deadline for filing suit expired on November 21, 1997, on the basis that Ms. Nguyen was charged with receipt of the notice of right to sue 3 days after the date on the letter, *i.e.* when it was presumptively delivered to her

mailbox during her absence, instead of upon her receipt of the same.

Not in dispute are the facts that Mr. Nguyen received the EEOC envelope from her neighbors on September 1, 1997, Labor Day, and Ms. Nguyen received it and actual notice on September 2, 1997. Ms. Nguyen's claim would not have been dismissed had the undisputed date of her receipt (or her husband's receipt) been used to determine when the 90-day right to sue period commenced. It is also clear that had Ms. Nguyen requested the post office to hold her mail, the notice could not have been actually provided to the Nguyen household earlier than September 2, as September 1 was a Federal holiday.

C. Proceedings Below

Jurisdiction in the district court was premised upon Ms. Nguyen's amended complaint alleging violations of Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §2000e et seq. After full discovery, the district court granted defendant's motion for summary judgment on the grounds that Ms. Nguyen did not file suit within 90 days of receiving notice of the right to sue. (App. B). The district court stated that "the 90 day limitations period is triggered not by the actual receipt by the plaintiff of the EEOC letter, but rather by the U.S. Postal Service's delivery of the letter, thus making it available to plaintiff." (App. B at 5, *citing* Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993) and Williams v. Enterprise Leasing Co. of Norfolk/Richmond, 911 F. Supp. 988 (E.D. Va. 1995)). The district court found that the fact that the delivery date to Ms. Nguyen's mailbox during her vacation is unknown does not create a genuine issue of fact "for the law mandates a 3-day delivery period." App. B at 6. Therefore, the

district court concluded that the 90-day right to sue period began when the August 20, 1997, letter was presumptively delivered to Ms. Nguyen's mailbox on August 23, 1997, and that the period expired on November 21, 1997, seven days before the action was filed. (App. B at 7). The court also found equitable tolling inapplicable.

Upon Ms. Nguyen's timely motion to alter or amend the order granting summary judgment, the district court denied the motion. (App. C). The district court denied relief stating: "**That other Circuits may follow different rules in ascertaining the date on which the 90-day limitations period begins running does not change the fact that the law in this Circuit is clear and settled, even if different from other circuits.**" (App. C at 2) (emphasis added). The district court had before it a sworn affidavit from the neighbors and Ms. Nguyen establishing the time and details of the vacation, the informal agreement to pick-up mail and hold it, and Mr. Nguyen's receipt of the mail bundle on September 1, 1997, and Ms. Nguyen's receipt of the notice on September 2, 1997. [1]

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[1] The district court and court of appeals found it significant that Ms. Nguyen did not provide during discovery a copy of the envelope in which the letter was mailed. (At deposition, Ms. Nguyen stated that she possessed the envelope.) The courts held that the missing postmark on the envelope created a factual dispute requiring the application of the three-day mail delivery rule found in Rule 6(e) of the Federal Civil Rules of Procedure. (App. B at 6-7; App. C at 6, n. 3.)

The fact that Ms. Nguyen could not produce the envelope has absolutely no factual or legal bearing on this matter. The envelope may as well have been delivered to Ms. Nguyen's mailbox and empty home on August 22 as August 23, 1997. Ms. Nguyen still would not have received it until September 1 or 2, 1997. Moreover, the postmark is incapable of proving when it was delivered to Ms. Nguyen's mailbox. Its production could only serve to assist Ms. Nguyen by establishing that the postmark was later than the date of the letter, leading to a later deadline for filing. Thus, its non-production certainly carries no inference that she withheld meaningful

Upon timely notice of appeal, the Court of Appeals for the Fourth Circuit affirmed, *per curiam*, in an unpublished opinion. (App. A). Ms. Nguyen pointed out that her filing would be timely under an "actual receipt" rule. See Appellant's Fourth Circuit Br. at 9-11, in passim. The Court of Appeals stated that "we have rejected an 'actual receipt' rule" and maintained that the Circuit engages in "a case-by-case examination to determine if equitable tolling of the filing period is appropriate." (App. A at 5). Although there was no dispute about the day on which Ms. Nguyen received the letter, the Fourth Circuit decided that the 90-day limitations period commenced when the EEOC's right to sue letter was delivered to Ms. Nguyen's home and picked up by a designated neighbor. (App. A at 6). The court determined that "Nguyen's neighbors were acting as Nguyen's **agent** and were the **intended recipient** of the EEOC letter." (App. A at 8) (emphasis added). The court cited no legal authority and no part of the record to support its finding of a legally cognizable agency relationship between Ms. Nguyen and her neighbors.

The court declined to apply equitable tolling. The court was unpersuaded that Ms. Nguyen's actions in safeguarding her mail during her absence, the delay of EEOC in copying her file, gathering evidence to support her case and meeting with counsel during her 90-day period, attempting settlement prior

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evidence, as defendant's have implied. Nor does its non-production put into question anything which was not already in question – the date Ms. Nguyen received the notice. The envelope is not evidence of receipt. The affidavits submitted by Ms. Nguyen and her neighbors clearly establish when people received the notice. Furthermore, the dispute presented here is not over the presumed date that the letter was postmarked, but over whether the 90 days began to run when it arrived in Ms. Nguyen's mailbox or when she actually received it.

to filing suit, and, most important to Ms. Nguyen, her prejudicial reliance on erroneous advice from the EEOC (including a supervisor) that her 90 days commenced upon her receipt on September 2, 1997, were sufficient to toll the filing period. (App. A at 7-8).

The EEOC participated by brief and at oral argument as an Amicus Curiae in support of Ms. Nguyen. (See EEOC Amicus Brief ("Am. Br.")). The EEOC explained that the Title VII language is inconsistent with the holding that the 90-day limitations period commences when the EEOC notice is delivered to complainant's mailbox. (Am. Br. at 1). Participation by the EEOC was important because the resolution of the issue will have a significant impact on numerous Title VII litigants. (Am. Br. at 2). The EEOC maintains that the EEOC regulations, as embodied in its Notice of Dismissal and Notice of Right to Sue, correctly interpret the statutory language as requiring a 90-day period to be triggered by Ms. Nguyen's receipt, not by mere presumptive delivery to her mailbox or her neighbors. (Am. Br. in passim).

Like Ms. Nguyen, the EEOC found incredible the argument that delivery to Ms. Nguyen's mailbox during her vacation constituted good notice even where Ms. Nguyen proved when she had actually received the letter. Id. Recognizing that Courts at times apply the doctrine of constructive receipt where the plaintiff delays receipt, the EEOC determined that Ms. Nguyen did everything the EEOC or the law could have expected of her to receive her mail in a timely fashion. Id. at 11. Ms. Nguyen, in the view of the EEOC, should not be required to inform her neighbors in this case about her pending discrimination charge as it would be inconsistent with Congress' concern for confidential charge processing. (Am. Br. at 11-12, citing University of

Pennsylvania v. EEOC, 493 U.S. 182, 192-93 (1990)). Notwithstanding the United States' position, the court rejected the EEOC's statutory interpretation and its legal and policy-based reasoning.

The Court of Appeals denied Ms. Nguyen's timely Petition for Rehearing and Rehearing En Banc by Order filed August 24, 1999. (App. B). It is from this Order that Ms. Nguyen respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

REASONS FOR GRANTING THE WRIT

The Civil Rights Act of 1964 applies in all jurisdictions with the same force and effect. Individual rights under the Act can be consistent throughout the nation only when both the substance and the process of the Act are applied consistently across the Courts of Appeals. The decision in this case, however, demonstrates that significant conflicts exist between the Courts of Appeals regarding the appropriate timing of the 90-day period that Congress gave Title VII claimants to file a lawsuit after they receive their "right to sue" letter from the EEOC. Allowing those conflicts to go unaddressed leaves Title VII complainants confused as to their responsibilities while generating unnecessary conflicts regarding what should be a straightforward application of statutory law. This Court should grant review to ensure that Title VII is applied consistently throughout the nation, giving all claimants the amount of time that Congress deemed necessary to bring a civil rights action.

The first conflict arises because the "delivery rule" applied by the Court of Appeals for the Fourth Circuit in this case (and

used by the Sixth Circuit) is at odds with the "actual receipt rule" applied by at least 5 Circuit Courts under similar facts. The D.C., Second, Third, Seventh, and Tenth Circuit Courts maintain that the 90-day right to sue period is triggered when the complainant (or sometimes a designated counsel or family member) *receives* the EEOC notice of the 90-day right to sue period, not when the EEOC envelope is presumptively delivered to one's mailbox. The division among the circuits reflects different interpretations of both Title VII statutory language and an EEOC regulation. This Court should grant certiorari to resolve that conflict, and explain what triggers the running of the 90-day statute of limitations.

After this case, the Courts of Appeals also disagree about a related question that arises when someone other than the claimant received the EEOC letter. The Courts of Appeals disagree about the relationship necessary between claimant and the recipient to impute "notice" to the claimant upon the other party's receipt of the letter. In this case, despite Ms. Nguyen's and the EEOC's arguments to the contrary, the Fourth Circuit deemed a friendly neighbor as an "agent" and "the intended recipient" of the right to sue letter. Nothing is further from Ms. Nguyen's actual intent and the neighbor's actual authority in this case. Aside from the error of fact and law in this case, the decision generates a division in the circuits regarding who is capable of being charged with receipt of EEOC's notice of right to sue. Review by this Court is therefore warranted.

Finally, the Fourth Circuit's decision generates a division in the circuits regarding when equitable tolling should be applied even if a suit if filed late. In circumstances like this one -- where the claimant took all reasonable steps to ensure timely receipt, and where the belated filing was based, in part, on erroneous advice from the EEOC, other courts have applied

equitable tolling. The Fourth Circuit's failure to do so in this case reflects an improper application of equitable tolling that should be reviewed by this Court.

1. There is a clear split among the United States Courts of Appeals regarding whether "actual notice" -- or some other events -- trigger the 90-day statute of limitations for commencement of a Title VII action.

This Court has held that the 90-day time period within which to bring suit under the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., is akin to a statute a limitations, subject to equitable tolling, and is not jurisdictional. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). The statutory language at issue is the same here as it was in Zipes: It provides that "the Commission . . . shall . . . notify [the complainant of the dismissal] and within ninety days after the *giving of such notice* a civil action may be brought against the respondent named in the charge." 42 U.S.C. §2000e-5(f)(1) (emphasis added). Thus, Congress set a 90-day period between one's "notice" of dismissal of EEOC charges and the last day to file a civil action.

The Commission, or EEOC, has promulgated regulations to carry out Congress' mandate to investigate and process claims of discrimination. The EEOC's regulations governing the private sector provide that notice of the right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days *from receipt* of such authorization." 29 C.F.R. Part 1601.28(e)(1) (emphasis added). The EEOC's interpretation of a statute it enforces is entitled to deference. Udall v. Tallman, 380 U.S. 1, 16 (1965).

The EEOC reasonably interprets the statute to give complainants 90 days to file their suit beginning when the complainants are informed, or "authorized" that they may do so. Ms. Nguyen's Notice of Dismissal and Rights provides that **"If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice."** (emphasis in original) (App. A at 3 (without original emphasis); EEOC Am. Br. at 6-7). Therefore, in the view of the EEOC, the clock starts "ticking" upon the complainant's *receipt* of the notice. The EEOC view comports with the reasonable interpretation that the 90 days belongs to the complainant and is not meant to be shared with the EEOC or the U.S. Postal Service.

In this case, the Fourth Circuit refused to accept the EEOC's interpretation by holding that even if the complainant can prove when she first received the right to sue letter, the Circuit will begin the 90-day right to sue period three days after the date the letter issued. (App. A at 6). The Court of Appeals reasoned that the letter arrived at the charging party's mailbox three days after the date it was presumptively sent by the EEOC. The court added three days to the letter's date by invoking Rule 6(e) of the Federal Rules of Civil Procedure, which provides: [2]

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[2]The reliance upon Rule 6(e) stems from this Court's presumption in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 150 n. 4, 104 S.Ct. 1723, 1725 n. 4 (1984) (per curium), that a district court received a Title VII complaint within 3 days of its mailing. At issue in Baldwin, however, was whether the filing of a right to sue letter constituted a sufficient complaint to commence a suit. Id. Moreover, the three-day presumption in Rule 6(e) is not a general rule for receipt of an EEOC notice by a complainant, but receipt of a complaint by a court, as the rule was intended to operate. Id. The Federal Rules of Civil Procedure are not generally applied to an administrative notice given before a person has invoked the judicial system to resolve her complaint.

> (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

According to the Fourth Circuit, therefore, *delivery* to the charging party's *mailbox* is the key. Under this "delivery rule," there is essentially a 93-day period within which to file suit using the date stamped on the EEOC letter. Following this decision, litigants in the Fourth Circuit must file suit within 93 days of the date on the letter, not as the EEOC right to sue letter expressly notifies them, within 90 days of their receipt of the letter.

This is not the law in other circuits. Contrary to the Fourth Circuit's view, the holdings of the D.C., Second, Third, Seventh, and Tenth Circuit Courts stand for the "receipt rule" and disavow the "delivery rule."[3] The D.C. Circuit Court has

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[3]The Fifth Circuit has seemingly made it clear that, once again since Franks v. Bowman Trans. Co., 580 F.2d 191 (5th Cir. 1978), it will not deem notice given until the complainant-addressee has actually received it. "We have held repeatedly that when the right to sue letter is addressed to the claimant, the 90 day period begins to accrue when the claimant receives the notice." Hernandez v. Hill Country, 849 F.2d 139 (5th Cir. 1988), citing Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986). Compare Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247, 1249 (5th Cir. 1985) (holding that ordinarily, the 90-day right to sue will commence "on the date that notice is received at the address supplied to the EEOC by the claimant" and that tolling, not an actual receipt rule, will be used to save notices which are not actually received by complainants through no fault of their own).

indicated that it follows an actual receipt rule under similar facts to the instant case, demonstrating a firm basis for a split with the Fourth Circuit rule. In Bell v. Brown, 557 F.2d 849 (D.C. Cir. 1977), a Federal employee was subject to a 30-day period for filing suit under Title VII. The notice of his right to sue was dated August 27, 1974. Id. at 851. The notice was sent to his designated but former counsel by registered mail, which was held to be ineffective. Id. The notice to the complainant was sent by regular mail. Id. at 852. The Court held that "*[w]e do now know, and likely no one could be certain, as to when it was delivered. In any event, appellant did not see it until September 3, when he returned from a* vacation *begun on August 30.*" Id. (emphasis added). The D.C. Circuit held that the suit-filing period did not begin to run until Bell actually received the notice. Id. at 857.

The date of actual receipt controlled, and it was a simple determination made based upon Bell's affidavit. Id. at 852, n. 15. As should be the case here, the unknown date of delivery to Bell's apparently empty home did not sway the court from an actual receipt rule. See also Gordon v. National Youth Work Alliance, 675 F.2d 356, 363-64 (D.C. Cir. 1982) (holding under Title VII that where the "crucial fact" of the date of actual receipt is in dispute, an evidentiary hearing should be held prior to a trial on the merits) citing Bell v. Brown, supra,

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The Eleventh Circuit abides in general with the actual receipt rule as in Sousa, infra, in the Second Circuit. See Lewis v. Conners Steel Co., 673 F.2d 1240 (11th Cir. 1982); Franks v. Bowman Trans. Co., supra; Law v. Hercules, Inc., 713 F.2d 691 (11th Cir. 1983). The Eleventh Circuit recognizes that "when a plaintiff has not known of the receipt of the letter through no fault of his own or because of circumstances beyond his or her control, as in Franks, the time must begin to run from the time of actual receipt. Zillyette v. Capital One Financial Corp., 179 F.3d 1337 (11th Cir. 1999).

and other cases. Thus, the D.C. Circuit is inclined to recognize actual receipt as the controlling factor in Title VII cases on facts similar to this case.

The Second Circuit holds the view that, in accordance with 42 U.S.C. §2000e-5(f)(1), a Title VII action must be commenced within ninety days of the receipt of an EEOC right-to-sue letter. Sherlock v. Montefiore Medical Ctr., 84 F.3d 522 (2nd Cir. 1996); Sousa v. NLRB, 817 F.2d 10 (2nd Cir. 1988). The Second Circuit applies Rule 6(e) only if there is no admissible evidence on the date of actual receipt.[4] Id. That was not the case here. See also Comrie v. Bronx Lebanon Hosp., 133 F.3d 906, 1998 WL 29643 (2nd Cir. 1998) (unpublished opinion) (affidavit submitted by plaintiff stating her date of actual receipt successfully rebutted a three day presumption). In this case, the evidence demonstrates that Ms. Nguyen's husband retrieved the mail from the neighbors on September 1 and that she opened it on September 2, 1997.

The case of Sousa v. NLRB, 817 F.2d 10 (2nd Cir. 1987), involved facts similar to this case, but also led to a different result. In Sousa, the right to sue letter, which was a notice of a final agency decision involving a Federal employer, was dated August 16, 1985. The letter was sent by certified mail. The certified letter was received at the post office on August 31, 1985. A notice was placed in Sousa's post office box on

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[4] The Second Circuit is also willing to apply a five day presumption of receipt if the date of actual receipt cannot be substantiated. See, e.g., Tadros v. Coleman, 717 F.Supp. 996, 1008 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2nd Cir. 1990), cert. denied, 498 U.S. 869 (1990). Likewise, the Sixth Circuit has applied a five day presumption of receipt when actual receipt could not be proved. Cook v. Providence Hospital, 820 F.2d 176, 179 n. 3 (6th Cir. 1987); Hunter v. Stephenson Roofing, Inc., 790 F. 2d 472 (6th Cir. 1986).

September 5, 1985. Sousa took the certified mail notice to the counter and retrieved his EEOC letter on September 10, 1985. The Second Circuit held that September 10, 1985, the date of his actual receipt of the letter, is the effective date for measuring the 30-day period (then applicable to Federal employees). The court also stated that a 5-day delay in picking up Sousa's mail was not an unreasonable delay. Thus, the Second Circuit will not as a matter of law charge a complainant with receipt prior to his actual receipt even if the EEOC letter (or certified notice of it) arrived at his mailbox and effectively sat there for some number of days.

The case of Sherlock v. Montefiore Medical Ctr., supra, illustrates the split between the circuits on the actual receipt rule. The plaintiff in Sherlock filed her complaint 99 days after the *date* of the right to sue notice. Id. at 525. The plaintiff did not precisely recollect when she received the right to sue letter and could offer no admissible evidence on the point. Id. at 526. The defendant, however, received the letter at least 12 days after its typewritten date. Id. The late receipt by the defendant was enough to raise a question of fact as to whether Sherlock had received it within three days of the date stamped on the letter. Id. The Second Circuit reversed the district court and reinstated her complaint. Id. The important issue in the view of the Second Circuit was the date on which the plaintiff actually received it. The existence of admissible evidence on that point rebutted the presumption of receipt three days after mailing.

The Third Circuit also follows an actual receipt rule: where the actual receipt date is known, that date controls the determination of when the 90-day period is triggered. Mosel v. Hills Dept. Store, Inc., 789 F.2d 251 (3rd Cir. 1986); Hornsby v. USPS, 787 F.2d 87 (3rd Cir. 1986). See also Seitzinger v.

Reading Hosp. and Medical Ctr., 165 F.3d 236 (3rd Cir. 1999) (decided on equitable tolling grounds). In Mosel, the court reviewed the statutory language and concluded that "the time for filing a complaint begins to run when the plaintiff has notice of the EEOC Charge; this usually occurs on the date he receives a right to sue letter." Mosel, 789 F.2d at 252 (citations omitted). The court also recognized that "indeed" the EEOC letter specifically informs plaintiffs that the 90-day period does not begin to run until after they receive it. Id. The court explained why it did not apply Rule 6(e): because its purpose is to provide additional time when a time period is measured from the date mailed; whereas under the actual receipt rule, the 90-day period begins only *after* one receives the letter. Id. at 253 (also recognizing this Court's suggestion in Baldwin related to Rule 6(e)).

In Hornsby, supra, the Third Circuit made a clear statement that the mere delivery of an unmarked notice for pick-up of a certified letter (Form 3849), without indication as to who it was from or of any other relevant information, was, as a matter of law, legally insufficient to constitute "notice" to the addressee of one's 90-day right to sue period. Hornsby, 787 F.2d at 92. The facts in the instant case present a similar situation. Ms. Nguyen had no idea that the EEOC issued any letter, nor any reason to suspect that a dismissal letter would be issued at that time, prior to or during her vacation. Reasonably enough, the neighbors were not charged with calling Ms. Nguyen to discuss incoming mail or to open her mail and take action on it. Thus, the earliest date possible when Ms. Nguyen was in a position to be aware of her rights was September 1, 1997. Contrary to the Fourth Circuit, the Third Circuit would not have found a basis to charge Ms. Nguyen with knowledge of her rights prior to September 1 or 2, 1997.

The Seventh Circuit also follows the actual receipt rule. Recently faced with a case presenting receipt questions, the court made it clear that "the 90 day period begins to run when the claimant receives actual notice of her right to sue." Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir. 1999), citing Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 532 n. 11 (7th Cir. 1993) (other citations omitted). The actual receipt rule will not be applied, however, to plaintiffs who fail to receive actual notice through their own fault. Id. at 839; see St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1984) (complainant failed to notify EEOC of his new address). If the notice is sent by certified mail, the Seventh Circuit charges the plaintiff with notice on the day plaintiff actually received the letter as long as the letter is picked up before the Post Office's deadline to return it to the sender. Id.

The Tenth Circuit likewise has a general rule that the 90-day period for filing suit under title VII commences on the date that the complainant actually receives the right-to-sue letter from the EEOC. Williams v. Southern U. Gas. Co., 529 F.2d 483, 487 (10th Cir. 1976), cert. denied, 429 U.S. 959 (1976); Plunkett v. Roadway Express, Inc., 504 F.2d 417, 418-19 (10th Cir. 1974); Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991). Recently, the Tenth Circuit reviewed the rationale and held, once again, that "we are persuaded that starting the limitation period upon actual receipt of the right-to-sue letter is the view most in keeping with the language and purpose of the statute. Jackson v. Continental Cargo, 183 F.3d 1186, 1189 (10th Cir. 1999).

The Fourth Circuit opinion in this case adopts a delivery rule: assuming 3 days for delivery unless proved otherwise, complainants have 93 days from the date stamped on the

EEOC's 90-day right to sue letter within which to file suit.[5] Although that is not what the statute or regulation provides, the Sixth Circuit also follows a "delivery rule."[6] The Sixth Circuit has held that "the actual receipt of a right-to-sue letter by the charging party is not required to start the 90-day limitations period." Brown v. Hyperion Seating Corporation, 1999 WL 801591 (6th Cir. 1999) (unpublished opinion), citing Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324, 326 (6th Cir. 1988); Hunter v. Stephenson Roofing, Inc., 790 F.2d 472, 474-75 (6th Cir. 1986). According to the Sixth Circuit, "[a]s long as the right-to-sue letter is correctly mailed by the EEOC to the charging party's address of record, a presumption exists that the mail is received by the addressee and the 90-day limitations period begins to run five days after the date of mailing." Brown, supra, at 2. See also Cook v. Providence Hosp., 820 F.2d 176, 179 n. 3 (6th Cir. 1987) (emphasis added). But see Wilson v. National Car Rental System, Inc., 94 F.3d 646, 1996 WL 452882 (6th Cir. 1996) (unpublished opinion) (holding an age discrimination complaint timely filed

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[5] The Fourth Circuit has insisted that its rule in Harvey v. City of New Bern Police Dept., 813 F.2d 652, 654 (4th Cir. 1987) and Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 42 (4th Cir. 1993) rejected the actual receipt rule and adopted the "flexible" rule of the Fifth and Eleventh Circuits. But the Fourth Circuit goes further in its holding by embracing the delivery rule, while the Fifth and Eleventh Circuits tend to favor the actual receipt rule unless the complainant is at fault for not receiving timely actual notice. See case cited supra. This Court was not given an opportunity to review either Fourth Circuit case.

[6] The Ninth Circuit also appears to follow a "delivery rule." Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992). The Ninth Circuit seems to conclude that the 90-day period begins running when *delivery* of a right to sue notice is *attempted* at the address of record. Nelmida v. Shelly Eurocars, 112 F.3d 380, 384 (9th Cir. 1996).

because it was filed 88 days after the EEOC notice was "actually received").[7]

The Fourth Circuit and Sixth Circuit, and seemingly the Ninth Circuit, clearly follow a delivery rule and disavow the actual receipt rule. The wide split between the Circuit Courts prevents complainants from understanding when a suit is timely. Perhaps more important, the differing approaches also depart from the EEOC's sound interpretation and uniform advice to all complainants in all circuits under Title VII as well as the ADEA that notice begins to run when actually received by the complainant. Review by this Court is needed to resolve the notice requirements and the obligations of the EEOC.

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[7] Complaints brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621 et seq., which are received and processed by the EEOC like complaints arising under Title VII and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq., "may be brought . . . within 90 days after the date of the *receipt* of such [Commission] notice." 29 U.S.C. §626e (emphasis added). The statutory language of the ADEA is precisely how the EEOC interpreted the statutory language of Title VII, and the EEOC mandate to investigate and give notice to complainants of their right to sue is the same. Even the Sixth Circuit implicitly recognizes that an actual receipt rule would make cases come out differently in the course of applying the actual receipt rule to age claims. See, e.g., Wilson v. National Car Rental System, Inc., supra. The ADEA provision clearly supports Ms. Nguyen's and the EEOC's reading of the Title VII 90-day notice provision, an analogous statute hardly departing in Congressional intent when it comes to entitling a complainant to file a suit in federal court following dismissal by the EEOC. Practically, many complaints raise both Title VII and ADEA claims and are processed by the EEOC as if there is no distinction. The EEOC right to sue letter and the Notice of Dismissal and Rights provided to Ms. Nguyen apply on their faces to the ADEA as well as Title VII and the ADA -- a reasonable "one size fits all" approach given the perfunctory task at issue.

2. The split between the Fourth Circuit and other Circuit Courts concerning *who* can be charged with Notice of the 90-day right to sue period on behalf of the charging party must be resolved.

In this case, the Fourth Circuit converted Ms. Nguyen's neighbor into Ms. Nguyen's agent, for receipt of the EEOC notice, merely because the neighbor agreed to collect and hold Ms. Nguyen's mail while she was on vacation. This ruling highlights another important conflict between Circuits following the actual receipt rule and those, like the Fourth Circuit, that follow the delivery rule.

Of the Circuit Courts that endorse the actual receipt rule, there is near uniformity that a complainant can be charged with constructive receipt if a family member of responsible age and sound mind accepts the letter at the address designated by the complainant or if receipt is acknowledged by an attorney who the complainant designated to receive the notice. These two classes of people -- family members[8] and attorneys[9] -- are largely the only recognized classes of a putative agent of complainant.

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[8] See Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247 (5th Cir. 1985) (wife); Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) (son). Compare Franks v. Bowman Trans. Co., 580 F.2d 191 (5th Cir. 1978) (no notice where letter received and lost by 9-year old nephew); Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978) (no notice when wife received letter) with St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1983) (notice imputed if fault).

[9] See Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344 (D.C. Cir. 1986); Mosel v. Hills Dept. Store, Inc., 789 F.2d 251 (3rd Cir. 1986); Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982); Craig v. Dept. of HEW, 581 F.2d 189, 193 (8th Cir. 1978) (federal sector).

The theory of constructive notice is that the notice is as good as giving it to the complainant directly. It is also the predominant view that charging certain family members with receipt will protect against the possibility that they would help a complainant manipulate the commencement of the 90-day right to sue period. See, e.g., Law v. Hercules, 713 F.2d 691 (11th Cir. 1983). Moreover, it is presumed that both family members at the designated address and designated attorneys have ready access to the complainant to inform him or her of the EEOC letter and possibly have been privy to the ongoing EEOC charge process. See id. and cases cited supra, n. 8.

The Fourth Circuit in this case demonstrated an unprecedented willingness to create a new class of agents: neighbors. The relationship with neighbors rarely, if ever, rises to that same level of implicit trust as family, and, in the case of attorneys, legal or fiduciary responsibility. The casual relationship with neighbors is reflected by the facts of this case, in which there was no evidence that Ms. Nguyen's neighbor was designated to do anything more than bundle together and safekeep in their home mail from Ms. Nguyen's mailbox for a week-long period. Had the EEOC sent the letter by certified mail (as the EEOC formerly did), Ms. Nguyen's neighbor would have had no right to obtain the EEOC notice. Nevertheless, the Fourth Circuit held Ms. Nguyen accountable on the theory that she had -- without the neighbors' knowledge or consent -- formally designated them as her "agents" with serious legal consequences.

Recognizing the unacceptable results that flow from a decision like that reached by the Fourth Circuit, the EEOC argued strongly against such a ruling in both its *Amicus* Brief and at oral argument. See EEOC *Amicus* Brief. As the EEOC and Ms. Nguyen pointed out, Title VII's plain language

requires that the complainant have 90 days within which to file suit "*after* the giving of notice" by the Commission. 42 U.S.C. §2000e-5(f)(1). The EEOC reasonably understood this to mean that the aggrieved individual have the full benefit of 90 days, thus the 90 days begins to run upon receipt. The ruling in this case, however, demonstrates that "delivery rule" jurisdictions have essentially no criteria for determining who amounts to an "agent."

In this case, for instance, the Fourth Circuit would likely have arrived at the same conclusion if a teenager had been hired to bring the mail and paper in when she fed the fish every other day.[10] The Fourth Circuit's ruling, in combination with its "delivery rule," dangerously dilutes the meaning of the statute, is in conflict with other Circuits, and shows no deference to the EEOC regulation charging notice upon the complainant's receipt.

In order to prevent this division among the Circuit Courts from creating further confusion in Congress' straightforward directive that claimants should have 90 days in which to file suit after receiving their right-to-sue letter, this Court should grant review and reverse the ruling of the Fourth Circuit.

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[10] The extremely broad interpretation of who could amount to an "agent" under the delivery rule suggests that the question is actually a red herring. Because the 90-day period in the Fourth Circuit begins to run on the date of delivery, rather than on the date that the letter is actually received by the claimant, its ruling would be no different if Ms. Nguyen had allowed her mail to pile up in her mailbox, rather than acting responsibly and asking her neighbor to pick it up. Ultimately, the Fourth Circuit's broad holding regarding agency says more about its error on the merits of the "actual receipt" vs. "delivery" rule than it does about anything else.

3. The division among the Circuit Courts concerning the principles of equitable tolling applicable to Title VII statutes of limitations cases must be resolved in order to ensure a fair and consistent nation-wide application of the 90-day right to sue period.

Although the Fourth Circuit has ruled that it will apply the principles of equitable tolling to correct injustices by conducting a thorough examination of facts, it held in this case that equitable tolling was in appropriate, in part, because Ms. Nguyen had from 56 to 80 days left in the filing period. See Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 42 (4th Cir. 1993); Harvey v. City of New Bern Police Dept., 813 F.2d 652, 654 (4th Cir. 1987). Its approach to equitable tolling highlights a division among the circuits regarding the appropriate use of that principle in Title VII statutes of limitations cases.

Cases such as this one exist only at the margin of the 90-day filing period. To say that Ms. Nguyen still had 80 days (App. A at 7) or 56 days (App. A at 8) within which to file suit swallows the equitable tolling argument: If a charging party believes that the 90 days expire on December 1, it does the party no good to be informed after the fact that her first 80 or 56 days count more than the last 10 or 36 days. Lawyers and judges know this best. Court filings are typically made on or slightly before the last allowed day, and that day is equally as effective as the earlier days.

Recognizing the value of receiving the full 90-day period, this Court has emphasized that the 90-day period for filing a Title VII claim against a private employer with the EEOC was not jurisdictional but is, like a statute of limitations, subject to

equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); see also Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990) (holding the same in the Federal sector). In Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), this Court discussed the application of equitable tolling and the importance of diligence on the part of the claimant.

Here, Ms. Nguyen was the picture of diligence given that she believed she had until December 1, 1997, to file her claim. She had her neighbor collect and protect her mail while she was on vacation. Within days of returning and receiving the EEOC letter, Ms. Nguyen sought legal advice on the merits of her claim, obtained with difficulty her EEOC file, obtained advice from the EEOC as to when the 90-day period to sue began, obtained an affidavit from a doctor in support of the merits of her case, and pursued settlement options instead of rushing to litigate. Ms. Nguyen did not waste one of her 90 days. Ms. Nguyen promptly filed suit *pro se* on the day after Thanksgiving, November 28, not waiting until December 1.

The reason why Ms. Nguyen believed she had until December 1, 1997, to file her claim is due in large to the advice from both a case worker and a supervisor at the EEOC who informed her that she had the full 90 days since her date of receipt to file her claim, although she would carry the burden of establishing that date. Ms. Nguyen met her burden by providing for the record her sworn affidavit and that of her neighbors, both of which established the date of her vacation and the date of her and her husband's actual receipt of the mail. Id.

The EEOC's advice (including the statements in the letter based upon the EEOC regulations) was misleading and ultimately erroneous in the Fourth Circuit. Ms. Nguyen relied

to her detriment on the advice. Other circuits have applied equitable tolling when the EEOC provides erroneous advice. See, e.g., Simpkins v. Washington Metropolitan Area Transit Authority, 132 F.3d 1482, 1997 WL 702349 (D.C. Cir. 1997) (unpublished opinion) (EEOC misinformation justifies tolling); Anderson v. UNISYS Corp., 47 F.3d 302, 306-7 (8th Cir. 1995) (collecting cases in various circuits) holding that equitable tolling may be justified when an administrative agency misleads a complainant); Johnson v. Al Tech Specialties Corp., 731 F.2d 143, 145 (2nd Cir. 1984) (Johnson unable to rebut Rule 6(e) presumption because Johnson would not follow his counsel's advice and file an affidavit regarding the erroneous advice from EEOC that he could file his complaint late); Chappell v. EMCO Machine Works Co., 601 F.2d 1295 (5th Cir. 1979) (collecting cases where EEOC misleading letters and advice justified invoking equities). See also Wagher v. Guy's Foods, Inc., 765 F.Supp. 667 (D. Kan. 1991) (applying equitable tolling where claimant took reasonable steps to safeguard her mail).

Despite this authority favoring equitable tolling in this case, the Fourth Circuit ignored the EEOC's bad advice and laid full blame on Ms. Nguyen.[11] The Fourth Circuit's decision is not supported by fact or law, and highlights the division between the Fourth Circuit and other Circuit Courts regarding the appropriate application of equitable tolling. Ms. Nguyen did everything she should have done to ensure that her suit was

[11] The fact that Ms. Nguyen was represented by counsel for very nearly the last 17 days of her filing period hardly ends the debate. During those 17 days, Ms. Nguyen diligently pursued her claim with the good faith belief that her filing period ended on December 1, so stated in plain language in the demand letter. When confronted with the first hint of objection to that conclusion and a rejection of settlement overtures by the hospital on November 24, Ms. Nguyen filed suit promptly.

timely filed, but fell victim to an interpretation of the federal law that deviates from other circuits. This Court should grant review to ensure that federal law is applied fairly and consistently to Ms. Nguyen and claimants like her.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 1999

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-2215

GIAO NGUYEN,

Plaintiff-Appellant,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-97-1935-A)

Argued: June 8, 1999

Decided: July 30, 1999

Appendix A

Before MICHAEL, Circuit Judge,
HOWARD, United States District Judge for the
Eastern District of North Carolina, sitting by designation,
and FRIEDMAN, United States District Judge, for the
Eastern District of Virginia, sitting by designation.

Affirmed by an unpublished per curiam opinion.

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Giao Nguyen (hereinafter "Nguyen") filed suit in federal district court against her former employer, INOVA Alexandria Hospital (hereinafter "Alexandria Hospital") and claimed national origin discrimination, harassment and retaliation during the course of and in the termination of employment. Nguyen claimed that such alleged discriminatory acts by her employer are in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Alexandria Hospital moved for summary judgment on all of Nguyen's claims.

The district court dismissed Nguyen's action as untimely. Nguyen moved for reconsideration of the district court's order and such motion was denied. Finding no error below, we affirm.

Appendix A

I.

Nguyen worked as a registered nurse in the intensive care unit of Alexandria Hospital from December 7, 1981, until her termination on June 18, 1996. After exhausting internal review procedures at the Hospital, on February 15, 1997, Nguyen filed a charge with the City of Alexandria's Office for Human Rights alleging national origin discrimination, harassment and retaliation. On February 20, 1997, the complaint was forwarded to the Equal Employment Opportunity Commission ("EEOC") pursuant to the worksharing agreement between the local agency and the EEOC.

The EEOC found no probable cause for discrimination and issued a Notice of Right to Sue by regular mail and date-stamped August 20, 1997. The letter informed Nguyen that "should you wish to pursue the matter in court, suit must be filed within 90 days of your receipt of this letter." The EEOC also included a document entitled "Dismissal and Notice of Rights" explaining the limitations period. In the document, the EEOC reiterated that "[i]f you decide to sue, you must sue *WITHIN 90 DAYS* from your receipt of this Notice."

The Notice of Right to Sue arrived at Nguyen's mailbox sometime between August 22, 1997 and September 1, 1997. Nguyen was on vacation during that time and had specifically asked her neighbors to collect her mail while she and her family were away. When Nguyen and her family returned from vacation on September 1, 1997, Nguyen's husband picked up their mail from the neighbors. The next day, on

September 2, 1997, Nguyen opened the EEOC's letter.

On September 9, 1997, Nguyen telephoned legal counsel and sought advice on her discrimination case. An initial consultation was originally scheduled for September 19, 1997, and Nguyen was told to bring her EEOC complaint file to the meeting. Nguyen did not retrieve her file in time for the meeting and the meeting was rescheduled for September 26, 1997.[1] Apparently at that meeting, legal counsel told Nguyen to gather corroborating evidence in support of her allegations.

On November 20, 1997, Nguyen's lawyers first contacted counsel for Alexandria Hospital seeking a settlement of Nguyen's potential claims. In the letter, Nguyen's counsel addressed the 90-day limitations period:

> Given the short statute of limitations, I must ask that you provide me with a response as soon as possible. The 90-day right to sue letter is dated August 20, 1997, and Ms. Nguyen received it September 2, 1997, when she and her family returned from an out-of-town trip. Therefore, Ms. Nguyen will need to file a civil action no later than December 1, 1997, in order to protect her rights.

Counsel for the Hospital promptly responded by letter on November 24, 1997, and indicated that a response to the

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1. Nguyen claims that the delay in retrieving her file is attributed to the EEOC. This allegation is discussed later in the opinion.

settlement proposal would be forthcoming. Two days later, counsel for the Hospital rejected the settlement proposal and specifically addressed the limitations period:

> Lastly, I am not at all convinced that Ms. Nguyen's claim is not barred by the statute of limitations, and am curious about her assertion of when she allegedly "received" the 90-day right-to-sue letter. If suit is filed, we will pursue that issue thoroughly.

On November 28, 1997, Nguyen filed a *pro se* complaint in the United States District Court for the Eastern District of Virginia. Alexandria Hospital moved to dismiss on the ground that Nguyen had pled under the Alexandria Human Rights Code for which there is no cause of action. The district court permitted Nguyen to amend her complaint and plead claims under Title VII.

Alexandria Hospital filed a motion for summary judgment on all claims. The district court dismissed the action as untimely. The district court held that the 90-day period began to run on the day the EEOC letter was delivered by the U.S. Postal Service to Nguyen's residence. Since the date of actual delivery was unknown, the district court applied the presumption of a three-day delivery period under Rule 6(e) of the Federal Rules of Civil Procedure. Thus, the district court found that the EEOC letter had been delivered on August 23, 1997, and the 90-day period expired on November 21, 1997, seven days before the action was filed and therefore the action was time-barred. In addition, the court found that no reasons existed to apply the doctrine of

equitable tolling. Nguyen filed a motion for reconsideration and the same was denied.

II.

We must review the district court's grant of summary judgment in favor of Nguyen *de novo* on appeal. In that sense, we must apply the same standard used by the district court itself. *See Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 233 (4th Cir. 1991). "[T]he non-moving party is entitled to have his evidence as forecast assumed, his version of that in dispute accepted, and the benefit of all favorable inferences." *Id.* at 233. *See also EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992).

The parties dispute whether delivery of a notice of right to sue letter to a claimant's home, where it is picked up by a delegated neighbor, is effective notice of the claimant's judicial rights. 42 U.S.C. § 2000e-5(f)(1) provides that if the EEOC finds no probable cause on a complaint, the agency "shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought . . . ." *Id.* The agency's own regulations direct that a notice of right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days from receipt of such authorization." 29 C.F.R. § 1601.28(e)(1). The EEOC's letter informs the individual that he or she has 90 days after receipt in which to file suit. *Id.*

The date on which the claimant received the EEOC letter becomes critical in determining the commencement of the

90-day period. In ascertaining the delivery date, we have rejected an "actual receipt" rule. *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987). Instead, we have engaged in "a case-by-case examination to determine if an equitable tolling of the filing period is appropriate." *Id.* at 654. In the context of individual cases, we have held that delivery of a notice of right to sue triggered the limitations period. *See id.* (wife's receipt of notice letter triggered the 90-day period); *see also Watts-Means v. Prince George's Family Crisis Ctr.*, 7 F.3d 40, 42 (4th Cir. 1993) (Postal Service's notice to claimant that she could pick up the letter triggered the limitations period); *Harper v. Burgess*, 701 F.2d 29, 30 (4th Cir. 1983) (notice to plaintiff's counsel triggered limitations period and failure to notify EEOC of change of address was bar to equitable tolling).

We have also utilized procedural rules in ascertaining the receipt date of notice of right to sue letters. Of course, if the actual date of receipt is confirmed by evidence, that date governs. *Dixon v. Digital Equip. Corp.*, 976 F.2d 725, 1992 WL 245867, *1 (4th Cir. Sept. 30, 1992) (unpublished); *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, 911 F. Supp. 988, 991-992 (E.D. Va. 1995). If the date is unknown, however, it is presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules. Fed. R. Civ. P. 6(e); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 148, n.1, 104 S. Ct. 1723, 1724 (1984) (suggesting that Rule 6(e) applies when parties dispute the date of receipt).[2]

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2. Federal Rule of Civil Procedure 6(e) states:

(e) Additional Time After Service by Mail.

(Cont'd)

Appendix A

In this matter, we hold that the limitations period began to run when the Notice of Right to Sue was delivered to Nguyen's home and picked up by a designated neighbor. The letter was mailed on August 20, 1997, but the date on which the letter was actually delivered to Nguyen's home is in dispute.[3] In this situation, the district court's application of the presumption rule under Rule 6(e) was proper. Applying the three day rule, the letter is presumed to have been delivered to Nguyen on August 23, 1997, and the limitations period expired ninety days later on November 21, 1997.

The remaining question we must consider is whether there are equitable considerations sufficient enough to support the exercise of equitable tolling. We find that the equities do not weigh in favor of extending the 90-day period. Nguyen delegated her neighbors to pick up her mail while she and her family were on vacation. The neighbors acted as Nguyen's agent when they collected the Notice of Right to Sue letter and all other mail delivered to Nguyen's home between August 22, 1997, and September 1, 1997.

In any case, Nguyen had ample opportunity to file a

(Cont'd)

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

3. Indeed, Nguyen testified at her deposition that she is in possession of the envelope presumably showing the post-mark date on which the letter was sent. By not submitting the envelope as evidence, Nguyen has placed the issue of notice in dispute.

complaint once she was in actual receipt of the EEOC letter. Nguyen opened the EEOC letter on September 2, 1997. Even then, Nguyen had 80 days to file her complaint before the 90-day deadline on November 21, 1997.[4] In similar situations, we have found that there were no grounds for equitable tolling. *See Watts-Means*, 7 F.3d at 42 (equitable tolling inappropriate where plaintiff had 85 days to file claims); *Harvey*, 813 F.2d at 654 (equitable tolling inappropriate where plaintiff had 84 days to file his complaint).

Appearing as amicus curiae, the EEOC urges us to adopt a rule that excuses the limitations period for claimants who ask their neighbors to collect their mail while away from home.[5] When pressed at oral argument, however, the EEOC conceded that it has implemented cost-cutting measures and no longer sends its notice of right to sue letters by certified mail. The agency's current mailing system means that the date of actual delivery may not always be ascertainable. Nonetheless, we do not think that an agency's budgetary considerations provide a sound rationale for an open-ended time extension under Title VII. That is especially so in this case where Nguyen's neighbors acted as her agent and received the Notice of Right to Sue on her behalf.

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4. This is computed by adding the actual number of days left in the 90-day period from September 2, 1997, the date Nguyen opened the letter.

5. In defense of their position, the EEOC asserts that claimants have a right to privacy in the EEOC charge proceedings. According to the EEOC, the claimant's right of privacy would be undermined if the claimant were compelled to inform her neighbors. We find the EEOC's reasoning to be unpersuasive.

Indeed, this is a much different situation than what we encountered in *Ish v. Arlington County Virginia*, 918 F.2d 955, 1990 WL 180127, *1 (4th Cir. Nov. 21, 1990) (unpublished). In that case, the receptionist of the claimant's landlord had not been designated to collect the claimant's mail, but she had come into receipt of his notice of right to sue. We held that the limitations period did not commence upon receipt by the receptionist since she was not acting as the agent for the claimant. *Id.* Here, by contrast, Nguyen's neighbors were acting as Nguyen's agent and were the intended recipient of the EEOC letter.

Nguyen's argument that Alexandria Hospital induced her to sit on her rights is unavailing. Through her lawyers, Nguyen did not even notify Alexandria Hospital of her potential suit until November 20, 1997, or one day before the 90-day period ended. Alexandria Hospital promptly responded to Nguyen's offer of settlement four days later. There simply is no basis for this argument.

Nguyen's contention that she was hindered by administrative delay is equally unavailing. Nguyen asserts that the EEOC did not provide a copy of her administrative file until September 26, 1997. As of that date, Nguyen had 56 days to file her complaint. Here, the legal mistake was Nguyen's own fault and there is no justification for tolling the 90-day period. *See Citicorp Person-to-Person Fin. Corp. v. Brazell*, 658 F.2d 232, 234-235 (4th Cir. 1981).[6]

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6. We find that all of Nguyen's other grounds for equitable tolling are without foundation.

Appendix A

III.

For the reasons set forth, we affirm the district court's dismissal of Nguyen's claims as time-barred.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 97-1935-A

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

MEMORANDUM OPINION

Plaintiff Nguyen brought this three-count action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging unlawful discrimination and harassment on the basis of plaintiff's national origin (Vietnamese), discriminatory termination of plaintiff's employment, and retaliation. Defendant INOVA Alexandria Hospital ("Hospital") now moves for summary judgment pursuant to Fed. R. Civ. P. 56. Because the court concludes that plaintiff's action is time-barred, defendant's motion will be granted.

Background

Plaintiff was employed as a Registered Nurse in the

Hospital's Intensive Care Unit ("ICU") from December 7, 1981 until her employment termination on June 18, 1996. Defendant contended that plaintiff's employment termination was based on two incidents of unsatisfactory work performance, taking place in May 1996. Specifically, on May 22, 1996, plaintiff allegedly disobeyed a consulting physician's instructions regarding the administration of medication to an ICU patient. On May 29, 1996 plaintiff allegedly abandoned two ICU isolation patients while "resting" in an empty patient room. Defendant asserted that plaintiff was later replaced by an individual of African-American descent.

Following her employment termination, plaintiff filed an internal grievance with the Hospital's Vice President for Nursing and Support Services, who upheld the termination. On plaintiff's appeal to the Hospital's Employee Review Board, the termination was again upheld, after a documents review and a hearing. On February 15, 1997, plaintiff filed a complaint with the Alexandria Office of Human Rights. On February 20, 1997, plaintiff's complaint was forwarded to the Equal Employment Opportunity Commission ("EEOC") for investigation.

The EEOC found no probable cause for discrimination and issued a right-to-sue letter, which was date-stamped August 20, 1997. Plaintiff concedes that the EEOC letter was sent by regular mail, but asserts that she does not know on what date the EEOC letter arrived at her house. Plaintiff admits, however, that the letter arrived in her mailbox during the time she was on vacation — between August 22, 1997 and September 1, 1997. Plaintiff claims that she was in actual

receipt of the letter on September 2, 1997. Plaintiff filed this action on November 28, 1997.

Standard for Summary Judgment

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court is not to weigh the evidence, but rather must determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In so doing, the court must view the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and of establishing — based on the relevant portions of the pleadings, depositions, affidavits, if any, answers to interrogatories, and admissions on file — that there is no genuine issue of material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party must go beyond the pleadings and must, by its own affidavits and by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Matsushita*, 475 U.S. at 587. The nonmoving party must do more than simply show that there

is some metaphysical doubt as to the material facts. *Id.* at 586. Material facts are those facts whose determination will affect the outcome of the lawsuit, and an issue of material fact is genuine if the evidence is such that a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248.

Discussion

Defendant Hospital argues that plaintiff's claim is time-barred because she failed to file this action within the 90-day period prescribed by the statute, 42 U.S.C. § 2000e-5(f)(1). Defendant cites *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993), and *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, 911 F. Supp. 988 (E.D. Va. 1995), as mandating such conclusion. The court agrees.

In *Watts-Means*, the Fourth Circuit held that the 90-day limitations period is triggered not by the actual receipt by the plaintiff of the EEOC letter, but rather by the U.S. Postal Service's delivery of the letter, thus making it available to plaintiff. 7 F.3d at 42. Thus, the 90-day limitations period, here, did not begin to run on September 2, 1997, when plaintiff actually received the EEOC letter, but on the day when the letter was delivered to plaintiff's house.

Plaintiff argues that because the date on which the EEOC letter was delivered to her house is unknown, a genuine issue of a material fact exists, precluding summary judgment in favor of defendant Hospital. Plaintiff's analysis, however, is flawed. The fact that the date of delivery is unknown does not create a genuine issue of a material fact.

Appendix B

There is no dispute between the parties that the date of delivery is unknown. There is also no dispute that the EEOC letter was sent by regular mail and that it was date-stamped August 20, 1997. Under such circumstances, no genuine issue of fact remains, for the law mandates a 3-day delivery period. In *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, this court (Doumar, J.) applied the 3-day presumption in Fed. R. Civ. P. 6(e) in the context of delivery of an EEOC right-to-sue notice. Thus, where, as here, the delivery date is unknown but it can be established that the EEOC notice was sent via regular mail, it is presumed that delivery took place three days after the notice letter was sent.

Plaintiff attempts to dispute the date that the EEOC letter was sent, arguing essentially that the fact that the letter was dated August 20, 1997 does not establish that it was sent on that date. Plaintiff, however, presents no evidence whatsoever to support her apparent assertion that the letter was not sent on August 20, 1997. Plaintiff cannot create an issue of fact by merely asserting the existence of a metaphysical doubt. *See, Matsushita, supra*, 475 U.S. at 586. This is particularly so here where plaintiff has failed to produce the envelope that accompanied the letter, which would presumably show the date on which the letter was sent.

Thus, the court concludes that the EEOC letter is presumed to have been delivered to plaintiff on August 23, 1997, three days after the issuance of the letter, and that the 90-day limitations period expired on November 21, 1997, seven days before this action was filed. The court finds further that no reasons exist here to apply the doctrine of equitable tolling. Plaintiff was represented by counsel during

most of the 90-day period, and her argument that defendant induced her into not filing her action with the prescribed time is simply unconvincing.

Accordingly, the court concludes that plaintiff did not file this action within the prescribed period, and this action is therefore time-barred. Defendant's motion for summary judgment will be, therefore, granted, and this action will be dismissed with prejudice.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
June 19th, 1998

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

ORDER

This action comes before the court on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Upon consideration of the parties' submissions and for the reasons set forth in the Memorandum Opinion filed herewith, it is hereby

ORDERED that defendant's motion is granted, and this action is hereby dismissed with prejudice.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
June 19th, 1998

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 97-1935-A

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

ORDER

This action comes before the court on plaintiff Giao Nguyen's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend this court's Order, entered on June 19, 1998, which Order granted summary judgment in favor of defendant INOVA Alexandria Hospital ("Hospital"). Upon consideration of the parties' submissions, it is hereby

ORDERED that plaintiff's motion is denied.

Plaintiff Nguyen brought this three-count action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging unlawful discrimination and harassment on the basis of plaintiff's national origin (Vietnamese), discriminatory termination of plaintiff's

employment, and retaliation. On defendant Hospital's motion for summary judgment, this court concluded that plaintiff's action was time-barred, and thus entered an Order of summary judgment in favor of defendant Hospital.

Plaintiff now moves this court to reconsider its earlier ruling, but offers no new evidence that was not available before this court's earlier ruling. Nor does plaintiff show that this court committed a clear error of law. That other Circuits may follow different rules in ascertaining the date on which the 90-day limitations period begins running does not change the fact that the law in this Circuit is clear and settled, even if different from other Circuits. Accordingly, the court finds no bases on which to alter or amend its earlier ruling of June 19, 1998. Plaintiff's motion, therefore, is denied.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
July 17th, 1998

APPENDIX D

FILED
August 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2215
CA-97-1935-A

GIAO NGUYEN

Plaintiff – Appellant

v.

INOVA ALEXANDRIA HOSPITAL

Defendant – Appellee

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is

of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK